



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R04-OAR-2013-0486; FRL- 9914-26-Region-4]

Approval and Promulgation of Implementation Plans; Commonwealth of Kentucky: New Source Review for Fine Particulate Matter (PM_{2.5})

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve changes to the Kentucky State Implementation Plan (SIP), submitted by the Commonwealth of Kentucky, through the Kentucky Division for Air Quality (KDAQ) to EPA on January 31, 2013. The SIP revision modifies the Commonwealth's New Source Review (NSR), Prevention of Significant Deterioration (PSD), and Nonattainment New Source Review (NNSR) regulations to adopt into the Kentucky SIP Federal NSR permitting requirements for the implementation of the fine particulate matter (PM_{2.5}) national ambient air quality standards (NAAQS). All of the changes in Kentucky's January 31, 2013 SIP submission are necessary to comply with Federal requirements. EPA is proposing approval of the Commonwealth's January 31, 2013 revision to the Kentucky SIP because the Agency has preliminarily determined that the changes are consistent with the Clean Air Act (CAA or Act). Additionally, EPA is proposing to convert two conditional approvals for SIP infrastructure requirements (related to Kentucky's permitting program) to full approval under the CAA.

DATES: Comments must be received on or before [insert date 30 days after date of publication in the Federal Register].

ADDRESSES: Submit your comments, identified by Docket ID No EPA-R04-OAR-2013-0486, by one of the following methods:

1. www.regulations.gov : Follow the on-line instructions for submitting comments.
2. E-mail: R4-RDS@epa.gov.
3. Fax: (404) 562-9019.
4. Mail: EPA-R04-OAR-2013-0486 Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960.
5. Hand Delivery or Courier: Ms. Lynorae Benjamin, Chief, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

Instructions: Direct your comments to Docket ID No. EPA-R04-OAR-2013-0486. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at www.regulations.gov, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit

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Docket: All documents in the electronic docket are listed in the www.regulations.gov index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in www.regulations.gov or in hard copy at the Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your

inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: For information regarding the Kentucky SIP, contact Ms. Twunjala Bradley, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. Telephone number: (404) 562-9352; e-mail address: bradley.twunjala@epa.gov. For information regarding NSR, contact Ms. Yolanda Adams, Air Permits Section, at the same address above. Telephone number: (404) 562-9214; e-mail address: adams.yolanda@epa.gov. For information regarding PM_{2.5} NAAQS, contact Mr. Joel Huey, Regulatory Development Section, at the same address above. Telephone number: (404) 562-9104; e-mail address: huey.joel@epa.gov.

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I. What Action is EPA Proposing?

On January 31, 2013, KDAQ submitted a SIP revision to EPA for approval into the Kentucky SIP to adopt Federal requirements for NSR permitting. The Commonwealth's SIP revision makes changes to the regulations at Kentucky's Air Quality Regulations, 401 KAR 51:001- *Definitions for 401-KAR Chapter 51*; 401 KAR 51:017 – *Prevention of significant deterioration of air quality* and 401 KAR 51:052 – *Review of new sources in or impacting upon nonattainment areas* to adopt NSR requirements related to the implementation of the PM_{2.5}¹ NAAQS as promulgated in the rulemakings entitled “Implementation of the New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers,” Final Rule, 73 FR 28321 (May 16, 2008) (hereafter referred to as the NSR PM_{2.5} Rule) and “Prevention of Significant Deterioration (PSD) for Particulate Matter Less Than 2.5 Micrometers (PM_{2.5}) – Increments, Significant Impact Levels (SILs) and Significant Monitoring Concentration (SMC),” Final Rule, 75 FR 64864 (October 20, 2010) (hereafter referred to as the “PM_{2.5} PSD Increments-SILs-SMC Rule”) to comply with Federal NSR permitting regulations at 40 CFR 51.166 and 51.165.²

¹ Airborne particulate matter (PM) with a nominal aerodynamic diameter of 2.5 micrometers or less (a micrometer is one-millionth of a meter, and 2.5 micrometers is less than one-seventh the average width of a human hair) are considered to be “fine particles” and are also known as PM_{2.5}. Fine particles in the atmosphere are made up of a complex mixture of components including sulfate; nitrate; ammonium; elemental carbon; a great variety of organic compounds; and inorganic material (including metals, dust, sea salt, and other trace elements) generally referred to as “crustal” material, although it may contain material from other sources. The health effects associated with exposure to PM_{2.5} include potential aggravation of respiratory and cardiovascular disease (i.e., lung disease, decreased lung function, asthma attacks and certain cardiovascular issues). On July 18, 1997, EPA revised the NAAQS for PM to add new standards for fine particles, using PM_{2.5} as the indicator. Previously, EPA used PM₁₀ (inhalable particles smaller than or equal to 10 micrometers in diameter) as the indicator for the PM NAAQS. EPA established health-based (primary) annual and 24-hour standards for PM_{2.5}, setting an annual standard at a level of 15.0 micrograms per cubic meter (µg/m³) and a 24-hour standard at a level of 65 µg/m³. See 62 FR 38652. At the time the 1997 primary standards were established, EPA also established welfare-based (secondary) standards identical to the primary standards. The secondary standards are designed to protect against major environmental effects of PM_{2.5}, such as visibility impairment, soiling, and materials damage. On October 17, 2006, EPA revised the primary and secondary 24-hour NAAQS for PM_{2.5} to 35 µg/m³ and retained the existing annual PM_{2.5} NAAQS of 15.0 µg/m³. See 71 FR 61236. On January 15, 2013, EPA published a final rule revising the annual PM_{2.5} NAAQS to 12 µg/m³. See 78 FR 3086.

² EPA's regulations governing the implementation of NSR permitting programs are contained in 40 CFR sections

Additionally, the Commonwealth's January 31, 2013 SIP submission satisfies EPA's multiple conditional approvals of the PSD-related requirements for sections 110(a)(2)(C), 110(a)(2)(D)(i)(II) and 110(a)(2)(J) of Kentucky's infrastructure SIPs for the 1997 and 2006 PM_{2.5} and 2008 8-hour ozone NAAQS. As a result, EPA is proposing to convert from conditional approval to full approval KDAQ's infrastructure requirements related to its PSD program. More details on EPA's conditional approvals are discussed in section III of this rulemaking.

EPA is not, however, proposing action to approve into the Kentucky SIP the PM_{2.5} SILs and SMC thresholds and provisions promulgated in EPA's PM_{2.5} PSD Increment-SILs-SMC Rule, 75 FR 64864 (October 20, 2010).³ More information regarding EPA's decision to not take action on these provisions is provided below in section II.

II. What is the Background for EPA's Proposed Action?

Today's proposed action to revise the Kentucky SIP relates to EPA's NSR PM_{2.5} Rule and the PM_{2.5} PSD Increment-SILs-SMC Rule. Together these two rules address the NSR permitting requirements needed to implement the PM_{2.5} NAAQS. The Commonwealth's January 31, 2013 revision adopts into the Kentucky SIP the PSD and

51.160 - .166; 52.21, .24; and part 51, Appendix S. The CAA NSR program is composed of three separate programs: PSD, NNSR, and Minor NSR. PSD is established in part C of title I of the CAA and applies in areas that meet the NAAQS – "attainment areas" – as well as areas where there is insufficient information to determine if the area meets the NAAQS – "unclassifiable areas." The NNSR program is established in part D of title I of the CAA and applies in areas that are not in attainment of the NAAQS – "nonattainment areas." The Minor NSR program addresses construction or modification activities that do not qualify as "major" and applies regardless of the designation of the area in which a source is located. Together, these programs are referred to as the NSR programs.

³ The D.C. Circuit Court of Appeals vacated the portions of the PM_{2.5} PSD Increment-SILs-SMC Rule addressing the SMC and SILs (and remanded the SILs portion to EPA for further consideration). *See Sierra Club v. EPA*, 705 F.3d 458 (D.C. Cir. 2013).

NNSR requirements promulgated in these two rules to be consistent with Federal regulations. More detail on the NSR PM_{2.5} Rule, PM_{2.5} PSD Increment-SILs-SMC Rule, the PM_{2.5} NAAQS and the NSR program can be found in EPA's May 16, 2008 and October 20, 2010 final rules and are summarized below. *See* 73 FR 28321 and 75 FR 64864, respectively.

A. NSR PM_{2.5} Implementation Rule

On May 16, 2008, EPA finalized the NSR PM_{2.5} Rule to implement the PM_{2.5} NAAQS for the NSR permitting program. *See* 73 FR 28321. The NSR PM_{2.5} Rule revised the Federal NSR program requirements to establish the framework for implementing preconstruction permit review for the PM_{2.5} NAAQS in both attainment and nonattainment areas (NAA). Specifically, the NSR PM_{2.5} Rule established the following NSR provisions to implement the PM_{2.5} NAAQS: (1) required NSR permits to address directly emitted PM_{2.5} and certain precursor pollutants; (2) established significant emission rates for direct PM_{2.5} and precursor pollutants (including sulfur dioxide (SO₂) and nitrogen oxides (NO_x)); (3) established NNSR PM_{2.5} emission offsets; and (4) required states to account for gases that condense to form particles (condensables) in PM_{2.5} and PM₁₀ applicability determinations and emission limits in PSD and NNSR permits; and (5) provided a grandfathering provision in the federal program for certain pending PM_{2.5} permit applications.⁴ Additionally, the NSR PM_{2.5} Rule authorized states to adopt provisions in their

⁴ On May 18, 2011, EPA took final action to repeal the PM_{2.5} grandfathering provision at 40 CFR 52.21(i)(1)(xi). This final action ended the use of the 1997 PM₁₀ Surrogate Policy for PSD permits under the Federal PSD program at 40 CFR 52.21. *See* 76 FR 28646. In effect, any PSD permit applicant previously covered by the grandfathering provision (for sources that completed and submitted a permit application before July 15, 2008) that did not have a final and effective PSD permit before the effective date of the repeal would no longer be able to rely on the 1997 PM₁₀ Surrogate Policy to satisfy the PSD requirements for PM_{2.5} unless the application included a valid surrogacy demonstration. The final rule also confirmed that states with SIP-approved PSD permitting programs could no longer rely on the PM₁₀ Surrogate Policy to satisfy the PSD requirements for PM_{2.5}. The Commonwealth's January

NNSR rules that would allow interpollutant offset trading.⁵ The Commonwealth's January 31, 2013 SIP revision addresses a portion of the PSD and NNSR provisions established in EPA's May 16, 2008 NSR PM_{2.5} Rule. A few key issues described in greater detail below include the NSR PM_{2.5} litigation and the PM condensable correction.

1. PM_{2.5} Implementation Rule(s) Litigation

On January 4, 2013, the United States Court of Appeals for the District of Columbia Circuit issued a judgment⁶ that remanded EPA's April 25, 2007⁷ and May 16, 2008 PM_{2.5} implementation rules implementing the 1997 PM_{2.5} NAAQS. *See Natural Resources Defense Council v. EPA*, 706 F.3d 428 (D.C. Cir. 2013). The court found that because the statutory definition of PM₁₀ (see section 302(t) of the CAA) included particulate matter with an aerodynamic diameter less than or equal to 10 micrometers, it necessarily includes PM_{2.5}. EPA

31, 2013 SIP revision does not rely on the PM₁₀ Surrogate Policy. For more information on the PM₁₀ Surrogate and Grandfathering Policy, see 76 FR 28646 (May 18, 2011), as well as an August 12, 2009, final order on a title V petition describing the use of PM₁₀ as a surrogate for PM_{2.5} entitled "*In re Louisville Gas & Electric Company*, Petition No. IV-2008-3, Order on Petition."

⁵ The Commonwealth's January 31, 2013 SIP submission did not adopt the NNSR interpollutant offset trading provisions EPA codified at 51.165(a)(11). The preferred trading ratios announced in the rule preamble were the subject of a petition to reconsider which was granted by the Administrator. As a result of the reconsideration, EPA issued a memorandum on June 20, 2011, providing that the ratios were no longer supported by the agency as being presumptively approvable for adoption in SIP's containing NNSR programs for PM_{2.5}. *See* EPA's June 20, 2011 Memorandum entitled "Revised Policy to Address Reconsideration of Interpollutant Trading Provisions for Fine Particles (PM_{2.5})" at <http://www.epa.gov/nsr/guidance.html>.

⁶ The Natural Resources Defense Council, Sierra Club, American Lung Association, and Medical Advocates for Healthy Air challenged before the D.C. Circuit EPA's April 25, 2007 (72 FR 20586) Rule entitled "Clean Air Fine Particle Implementation Rule," that established detailed implementation regulations to assist states with the development of SIPs to demonstrate attainment for the 1997 annual and 24-hour PM_{2.5} NAAQS and the separate May 16, 2008 NSR PM_{2.5} Rule (the subject of today's proposed rulemaking). Today's proposed rulemaking only pertains to the impacts of the court's decision on the May 16, 2008 NSR PM_{2.5} Rule and not the April 25, 2007 implementation rule as the Commonwealth's January 31, 2013 SIP revision proposes to adopt the NSR permitting provisions established in the NSR PM_{2.5} Rule.

⁷ "Clean Air Fine Particle Implementation Rule" (hereafter referred to as the 2007 Rule); Final Rule, 72 FR 20586 (April 25, 2007).

had developed the 2007 and 2008 (or NSR PM_{2.5} Rule) rules consistent with the general NAA requirements of subpart 1 of Part D, title I, of the CAA. Relative to subpart 1, subpart 4 of Part D, title I, includes additional provisions that apply to PM₁₀ NAA and is more specific about what states must do to bring areas into attainment through, among other things, the establishment of a two tier classification system for NAA (moderate or serious). The court concluded that since subpart 4 of the CAA generally applies to PM₁₀, EPA should have also followed the more prescriptive subpart 4 structure for the PM_{2.5} implementation rules. The court ordered EPA to repromulgate the implementation rules pursuant to subpart 4.

In particular, subpart 4 includes section 189(e) of the CAA, which requires the control of major stationary sources of PM₁₀ precursors (and hence under the court decision, PM_{2.5} precursors) “except where the Administrator determines that such sources do not contribute significantly to PM₁₀ levels which exceed the standard in the area.”

Subpart 4 pertains exclusively to particulate matter NAA, and the Court did not address EPA’s implementation of the PM_{2.5} NAAQS under part C or the PSD program. Thus, EPA does not interpret the court’s decision as affecting implementation of the PSD requirements established in the May 16, 2008 NSR PM_{2.5} Rule and does not anticipate the need to revise any PSD requirements promulgated in the NSR PM_{2.5} Rule in order to comply with the court’s decision.

On June 2, 2014, EPA published a final rule⁸ which, in part, sets a December 31, 2014 deadline for states to make any remaining required attainment-related and NNSR SIP

⁸ The final rule entitled “Identification of Nonattainment Classification and Deadlines for Submission of State Implementation Plan (SIP) Provisions for the 1997 Fine Particle (PM_{2.5}) National Ambient Air Quality Standard (NAAQS) and 2006 PM_{2.5} NAAQS.” This final rule also identifies the initial classification of current 1997 and 2006 PM_{2.5} nonattainment areas as moderate and the EPA guidance and relevant rulemakings that are currently available regarding implementation of subpart 4 requirements.

submissions, pursuant to and considering the application of subpart 4. *See* 79 FR 31566. Further analysis of this litigation in relation to Kentucky’s SIP revision is discussed in section IV.A. The Court’s January 4, 2013, decision can be found in the docket for today’s proposed rulemaking using Docket ID: EPA-R04-OAR-2013-0486.

2. “Condensable PM” Correction

In the NSR PM_{2.5} Rule, EPA revised the definition of “*regulated NSR pollutant*” for PSD to add a paragraph providing that “particulate matter (PM) emissions, PM_{2.5} emissions and PM₁₀ emissions” shall include gaseous emissions from a source or activity which condense to form particulate matter at ambient temperatures and that on or after January 1, 2011, such condensable particulate matter shall be accounted for in applicability determinations and in establishing emissions limitations for PM, PM_{2.5} and PM₁₀ in permits. *See* 73 FR 28321. A similar paragraph added to the NNSR rule does not include “particulate matter (PM) emissions.” *See* 40 CFR 51.165(a)(1)(xxxvii)(D).

On October 25, 2012, EPA took final action to amend the definition of “*regulated NSR pollutant*” promulgated in the NSR PM_{2.5} Rule regarding the PM condensable provision at 40 CFR 51.166(b)(49)(vi), 52.21(b)(50)(i) and EPA’s Emissions Offset Interpretative Ruling. *See* 77 FR 65107. The rulemaking removed the inadvertent requirement in the NSR PM_{2.5} Rule that the measurement of condensable “*particulate matter emissions*” be included as part of the measurement and regulation of “*particulate matter emissions*.” The term “*particulate matter emissions*” includes filterable particles that are larger than PM_{2.5} or PM₁₀ and is an indicator

measured under various New Source Performance Standards (NSPS) (40 CFR part 60).⁹ The Commonwealth's January 31, 2013 SIP revision adopts EPA's definition for *regulated NSR pollutant* requiring states to consider condensables (at 40 CFR 51.166(b)(49)(vi)), excluding the term "particulate matter emissions."

B. PM_{2.5} PSD-Increment-SILs-SMC Rule.

The October 20, 2010 final rulemaking established PM_{2.5} increments pursuant to section 166(a) of the CAA to prevent significant deterioration of air quality in areas meeting the NAAQS. Today's action pertains only to the PM_{2.5} increments (and relevant related implementing provisions) promulgated in the October 20, 2010, rule.¹⁰ The Commonwealth's January 31, 2013 SIP revision adopts NSR changes promulgated in the PM_{2.5} PSD Increments-SILs-SMC Rule to be consistent with the Federal NSR regulations and to appropriately implement the State's NSR program for the PM_{2.5} NAAQS. For the reasons explained below, EPA is not proposing in this rulemaking to take action to approve the Commonwealth's proposed revisions related to the SILs (at paragraph (k)(2) of section 51.166 and 52.21) and SMC (at paragraph (i)(5) of section 51.166 and 52.21) promulgated in the PM_{2.5} PSD Increments-SILs-SMC Rule into the Kentucky SIP. The SILs and SMC portions of the PM_{2.5} PSD Increments-SILs-SMC Rule were vacated (and in the case of the SILs, also remanded to EPA) by the D.C. Circuit Court of Appeals. *See Sierra Club v. EPA*, 705 F.3d 458 (D.C. Cir. 2013).

⁹ In addition to the NSPS for PM, it is noted that states regulated "particulate matter emissions" for many years in their SIPs for PM, and the same indicator has been used as a surrogate for determining compliance with certain standards contained in 40 CFR part 63, regarding National Emission Standards for Hazardous Air Pollutants.

¹⁰ The October 20, 2010, rule also established PM_{2.5} SILs and SMC. *See* 75 FR 64864, 64900. These two provisions were the subject of litigation by the Sierra Club. *See* section IV of this rulemaking for more information on the litigation or in the docket for today's proposed action using docket ID: EPA-R04-OAR-2013-0486.

1. What are PSD Increments?

As established in part C of title I of the CAA, EPA's PSD program protects public health from adverse effects of air pollution by ensuring that construction of new or modified sources in attainment or unclassifiable areas does not lead to significant deterioration of air quality while simultaneously ensuring that economic growth will occur in a manner consistent with preservation of clean air resources. Under section 165(a)(3) of the CAA, a PSD permit applicant must demonstrate that emissions from the proposed construction and operation of a facility "will not cause, or contribute to, air pollution in excess of any maximum allowable increase or allowable concentration for any pollutant." In other words, when a source applies for a permit to emit a regulated pollutant in an area that is designated as attainment or unclassifiable for a NAAQS, the state and EPA must determine if emissions of the regulated pollutant from the source will cause significant deterioration in air quality. Significant deterioration occurs when the amount of the new pollution exceeds the applicable PSD increment, which is the "maximum allowable increase" of an air pollutant allowed to occur above the applicable baseline concentration¹¹ for that pollutant. Therefore, an increment is the mechanism used to estimate "significant deterioration" of air quality for a pollutant in an area.

For purposes of calculating increment consumption, a baseline area for a particular pollutant includes the attainment or unclassifiable area in which the source is located as well as any other attainment or unclassifiable area in which the source's emissions of that pollutant are projected (by air quality modeling) to result in an ambient pollutant increase of at least 1 microgram per meter cubed ($\mu\text{g}/\text{m}^3$) (annual average). *See* 40 CFR 52.21(b)(15)(i). Under

¹¹ Section 169(4) of the CAA provides that the baseline concentration of a pollutant for a particular baseline area is generally the air quality at the time of the first application for a PSD permit in the area.

EPA's existing regulations, the establishment of a baseline area for any PSD increment results from the submission of the first complete PSD permit application and is based on the location of the proposed source and its emissions impact on the area. Once the baseline area is established, subsequent PSD sources locating in that area need to consider that a portion of the available increment may have already been consumed by previous emissions increases. In general, the submittal date of the first complete PSD permit application in a particular area is the operative "minor source baseline date" after which new sources must evaluate increment consumption.¹² On or before the date of the first complete PSD application, emissions generally are considered to be part of the baseline concentration, except for certain emissions from major stationary sources. Most emissions increases that occur after the minor source baseline date will be counted toward the amount of increment consumed. Similarly, emissions decreases after the applicable baseline date restore or expand the amount of increment that is available. *See* 75 FR 64864. As described in the PM_{2.5} PSD Increments-SILs-SMC Rule, and pursuant to the authority under section 166(a) of the CAA, EPA promulgated numerical increments for PM_{2.5} as a new pollutant¹³ for which NAAQS were established after August 7, 1977,¹⁴ and derived 24-hour and annual PM_{2.5} increments for the three area classifications (Class I, II and III). *See* 75 FR 64864 at 64869 and the ambient air increment table at 40 CFR 51.166(c)(1) and 52.21(c).

¹² Baseline dates are pollutant-specific. That is, a complete PSD application establishes the baseline date only for those regulated NSR pollutants that are projected to be emitted in significant amounts (as defined in the regulations) by the applicant's new source or modification. Thus, an area may have different baseline dates for different pollutants.

¹³ EPA generally characterized the PM_{2.5} NAAQS as a NAAQS for a new indicator of PM. EPA did not replace the PM₁₀ NAAQS with the NAAQS for PM_{2.5} when the PM_{2.5} NAAQS were promulgated in 1997. EPA rather retained the annual and 24-hour NAAQS for PM₁₀ (retaining PM₁₀ as an indicator of coarse particulate matter), and treated PM_{2.5} as a new pollutant for purposes of developing increments even though EPA had already developed air quality criteria for PM generally. *See* 75 FR 64864 (October 20, 2010).

¹⁴ EPA interprets section 166(a) to authorize EPA to promulgate pollutant-specific PSD regulations meeting the requirements of section 166(c) and 166(d) for any pollutant for which EPA promulgates a NAAQS after 1977.

In addition to PSD increments for the PM_{2.5} NAAQS, the PM_{2.5} PSD Increments-SILs-SMC Rule amended the definition at 40 CFR 51.166 and 52.21 for “major source baseline date” and “minor source baseline date” (including trigger dates) to establish the PM_{2.5} NAAQS specific dates associated with the implementation of PM_{2.5} PSD increments. *See* 75 FR 64864. In accordance with section 166(b) of the CAA, EPA required the states to submit revised implementation plans to EPA for approval (to adopt the PM_{2.5} PSD increments) within 21 months from promulgation of the final rule (by July 20, 2012). Regardless of when a state submits its revised SIP, the emissions from major sources subject to PSD for PM_{2.5} for which construction commenced after October 20, 2010 (major source baseline date), consume PM_{2.5} increment and should be included in the increment analyses occurring after the minor source baseline date is established for an area under the state’s revised PSD program. *See* 75 FR 64864. As discussed above, the Commonwealth’s January 31, 2013 SIP revision adopts the PM_{2.5} PSD increment permitting requirements, including the implementing regulations discussed above, promulgated in the PM_{2.5} PSD Increments-SILs-SMC Rule.

2. SILs and SMC Litigation

For background purposes, the SILs and SMC portions of the PM_{2.5} PSD Increment-SILs-SMC Rule, which EPA is not taking action on today, are numerical values that represent thresholds of insignificant modeled source impacts or monitored (ambient) concentrations, respectively. EPA established such values to be used as screening tools by a major source subject to PSD to determine the subsequent level of analysis and data gathering required for a PSD permit application for emissions of PM_{2.5}.

The Sierra Club challenged EPA's authority to implement the PM_{2.5} SILs and SMC for PSD purposes as promulgated in the October 20, 2010 PM_{2.5} PSD Increment-SILs-SMC Rule. *See Sierra Club v. EPA*, 705 F.3d 458. On January 22, 2013, D.C. Circuit granted a request from EPA to vacate and remand to the Agency the portions of the October 20, 2010 rule addressing the SILs for PM_{2.5} (found in paragraph (k)(2) in 40 CFR 51.166 and 52.21), except for the parts codifying the PM_{2.5} SILs in the NSR rule at 40 CFR 51.165(b)(2), so that the EPA could voluntarily correct an error in the provisions. *Id.* at 463-66. The Court also vacated parts of the PM_{2.5} PSD Increment-SILs-SMC Rule establishing the PM_{2.5} SMC, finding that the Agency had exceeded its statutory authority with respect to these provisions. *See id.* at 469. On December 9, 2013, EPA issued a final rulemaking to remove the vacated and remanded PM_{2.5} SILs and the vacated PM_{2.5} SMC provisions from 40 CFR 51.166 and 52.21.¹⁵ *See* 78 FR 73698.

The D.C. Circuit's decision can be found in the docket for today's rulemaking at <http://www.regulations.gov> using docket ID: EPA-R04-OAR-2013-0486.

The Commonwealth's January 31, 2013 SIP revision adopts both the PM_{2.5} SIL and SMC screening tools promulgated in EPA's October 20, 2010, PM_{2.5} PSD Increment-SILs-SMC Rule. However, as a result of the vacatur of these provisions, EPA is not taking action at this time on any portions of KDAQ's SIP submission regarding the PM_{2.5} SILs and SMC provisions as codified at 40 CFR 51.166 and 52.21. EPA will consider the Commonwealth's January 31, 2013 submission regarding the PM_{2.5} SILs and SMC thresholds in an action separate from today's rulemaking.

¹⁵ Final Rule entitled "Prevention of Significant Deterioration for Particulate Matter Less Than 2.5 Micrometers—Significant Impact Levels and Significant Monitoring Concentration: Removal of Vacated Elements."

III. EPA's Conversion of Conditional Approvals for the Commonwealth's Infrastructure SIP

In addition to adopting required NSR permitting regulations for the implementation of the PM_{2.5} NAAQS, the Commonwealth's January 31, 2013 SIP revision also satisfies EPA's conditional approval of the Commonwealth's 1997 annual and 2006 24-hour PM_{2.5}, and 2008 8-hour ozone 110(a)(2) infrastructure SIPs¹⁶ with respect to the PSD-related requirements¹⁷ of sections 110(a)(2)(C), 110(a)(2)(D)(i)(II) (prong 3) and 110(a)(2)(J) of the CAA. Kentucky submitted multiple SIP submissions to EPA for approval to address the 110(a)(2) infrastructure SIP requirements for the 1997 annual and 2006 24-hour PM_{2.5} NAAQS (August 26, 2008 and July 17, 2012, respectively), and the 2008 8-hour ozone NAAQS (July 7, 2012).

On July 3, 2012, Kentucky submitted a letter requesting that EPA conditionally approve the Commonwealth's infrastructure SIP submissions with respect to PSD-related requirements

¹⁶ The CAA requires that each state adopt and submit a SIP for the implementation, maintenance, and enforcement of each NAAQS promulgated by EPA, which is commonly referred to as an "infrastructure" SIP. Pursuant to section 110(a)(1) of the CAA, states are required to submit SIPs meeting the applicable requirements of section 110(a)(2) within three years after promulgation of a new or revised NAAQS or within such shorter period as EPA may prescribe. On July 18, 1997, EPA promulgated the primary 1997 annual and 24-hour PM_{2.5} NAAQS as 15 µg/m³ and 65 µg/m³ respectively. *See* 62 FR 38652. On October 17, 2006, EPA strengthened the 24-hour PM_{2.5} NAAQS to 35 µg/m³. *See* 71 FR 61144. On March 27, 2008, EPA revised the NAAQS for ozone based on an 8-hour average concentrations to 0.075 parts per million (ppm). *See* 73 FR 16436.

¹⁷ There are four separate PSD related rulemakings that states are required to adopt and have approved into their SIP in order to maintain a comprehensive SIP-approved PSD permitting program and comply with the PSD and enforcement requirements of 110(a)(2) Infrastructure requirements for sections 110(a)(2)(C), (D)(i)(II) and (J) of the CAA. These include: 1) "Final Rule To Implement the 8-Hour Ozone National Ambient Air Quality Standard—Phase 2 Rule; Final Rule" (which codified NO_x as an ozone precursor for NSR) (70 FR 71612, November 29, 2005); 2) "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule" (75 FR 31514, June 3, 2010); 3) the NSR PM_{2.5} Rule and; 4) the PM_{2.5} PSD Increment-SILs-SMC Rule (only as it relates to PM_{2.5} Increments). *See* 77 FR 46352 (August 3, 2012), 78 FR 3867 (January 17, 2013) and 77 FR 72291 (December 5, 2012). Kentucky's January 31, 2013 submission satisfies two of the four required PSD rulemakings mentioned above including the 2008 NSR PM_{2.5} Rule and the PM_{2.5} Increments-SILs-SMC Rule (only as it relates to the PSD increments). EPA approved the remaining PSD requirements for the Greenhouse Gas Tailoring Rule and the Phase 2 Rule on December 29, 2010 (75 FR 81868) and on September 15, 2010 (75 FR 55988), respectively.

for sections 110(a)(2)(C) and 110(a)(2)(J) for the 1997 and 2006 PM_{2.5} NAAQS.¹⁸ Additionally, the Commonwealth submitted another correspondence on December 19, 2012, requesting conditional approval for PSD-related requirements of sections 110(a)(2)(C), 110(a)(2)(D)(i)(II) and 110(a)(2)(J) for the 2008 lead and 2008 8-hour ozone NAAQS infrastructure submissions.¹⁹ Both letters documented the Commonwealth's commitment to adopt and submit the PSD-related provisions needed to comply with sections 110(a)(2)(C), 110(a)(2)(D)(i)(II) (prong 3) and 110(a)(2)(J) all in accordance with section 110(k)(4) of the CAA to ensure a comprehensive PSD program.

EPA took action to approve in part and conditionally approve in part portions of the Commonwealth's infrastructure SIP submissions for the 1997 and 2006 PM_{2.5} NAAQS on October 3, 2012, March 7, 2013, and March 26, 2013. *See* 77 FR 60307, 78 FR 14681, and 78 FR 18241, respectively. EPA's conditional approval of the Commonwealth's PSD requirements for the section 110(a)(2) infrastructure SIPs committed Kentucky to adopt and submit to EPA within one year of publication of the final conditional approvals the required NSR permitting regulations promulgated in the NSR PM_{2.5} Rule and the PM_{2.5} PSD increments established in the 2010 PM_{2.5} PSD Increment-SILs-SMC Rule. As stated above, the submission of the applicable portions of these rules into the Kentucky SIP is necessary to comply with the PSD-related requirements of sections 110(a)(2)(C), 110(a)(2)(D)(i)(II) (prong 3) and 110(a)(2)(J) of the

¹⁸ EPA also relied upon Kentucky's July 3, 2012 commitment to address the PSD-related requirements as the basis for conditionally approving the Commonwealth's 1997 and 2006 PM_{2.5} NAAQS infrastructure SIPs as they relate to section 110(a)(2)(D)(i)(II). *See* 78 FR 18241 (March 26, 2013). EPA had already conditionally approved the Commonwealth's infrastructure SIPs for the 1997 and 2006 PM_{2.5} NAAQS for the PSD-related requirements related to sections 110(a)(2)(C) and (J) on October 3, 2012. *See* 77 FR 60307.

¹⁹ EPA has not taken action on the Commonwealth's 2008 lead Infrastructure SIP submission but will consider the action in a separate rulemaking.

infrastructure SIP for the 1997 annual and 2006 24-hour PM_{2.5} NAAQS, and the 2008 8-hour ozone NAAQS.

The Commonwealth's January 31, 2013 SIP revision satisfies the conditions listed in EPA's previous conditional approvals for the infrastructure submissions. Therefore, EPA is proposing action to convert its conditional approvals with respect to the PSD-related requirements of sections 110(a)(2)(C), 110(a)(2)(D)(i)(II) and 110(a)(2)(J) for the 2008 8-hour ozone, and the 1997 annual and 2006 24-hour PM_{2.5} NAAQS to full approval.

IV. What is EPA's Analysis of the Commonwealth's SIP Revision

The Commonwealth currently has a SIP-approved NSR program for new and modified stationary sources found at 401 KAR Chapter 51. KDAQ's PSD preconstruction regulations are found at 401 KAR Chapters 51:001²⁰ and 51:017 and apply to major stationary sources or modifications constructed in areas designated attainment or unclassifiable/attainment as required under part C of title I of the CAA with respect to the NAAQS. The Commonwealth's NNSR regulations are found at Chapter 51:052 and apply to the construction and modification of any major stationary source of air pollution in or impacting upon a nonattainment area, as required by Part D of title I of the CAA. The Commonwealth's January 31, 2013 SIP submission includes changes to Chapter 51 that adopt into the State's NSR permitting program provisions promulgated in the NSR PM_{2.5} Rule and the PSD increments established in the PM_{2.5} PSD Increment-SILs-SMC rule. These changes to the Commonwealth's regulations became state effective on December 7, 2012. EPA is proposing to approve the changes to Chapter 51 into the

²⁰The Commonwealth's 401 KAR Chapter 51:001 codifies definitions that apply to sources applying for construction permits in both attainment/unclassifiable and nonattainment areas.

Commonwealth's SIP to be consistent with Federal NSR regulations (at 40 CFR 51.166) and the CAA.

A. NSR PM_{2.5} Implementation Rule

The Commonwealth's January 31, 2013 SIP revision establishes that the Commonwealth's existing NSR permitting program requirements for PSD and NNSR apply to the PM_{2.5} NAAQS and certain precursors. Specifically, the SIP revision adopts the following NSR PM_{2.5} Rule PSD and NNSR provisions into the Kentucky SIP: (1) the requirement for PSD and NNSR permits to address directly emitted PM_{2.5} and precursor pollutants (sulfur dioxide (SO₂) and nitrogen oxides (NO_x) (as codified at 40 CFR 51.165(a)(1)(xxxvii)(C) and 51.166(b)(49)); (2) the significant emission rates for direct PM_{2.5} and precursor pollutants (SO₂ and NO_x) (as codified at 40 CFR 51.165(a)(1)(x)(A) and 51.166(b)(23)(i)); (3) the NNSR PM_{2.5} emission offsets (as codified at 51.165(9)(i)) and (4) the PSD and NNSR requirement that condensable PM₁₀ and PM_{2.5} emissions be accounted for in PSD applicability determinations and in establishing emissions limitations for permitting (as codified at 40 CFR 51.165(a)(1)(xxxvii)(D) and 51.166(b)(49)). For the reasons discussed below, the EPA is proposing to approve these revisions into the Commonwealth's SIP.

As discussed above in section II, the D.C. Circuit in *Natural Resources Defense Council v. EPA* issued a decision that remanded the EPA's NSR PM_{2.5} Rule rule implementing the 1997 PM_{2.5} NAAQS. Relevant here, the NSR PM_{2.5} Rule promulgated NSR requirements for implementation of PM_{2.5} in both nonattainment areas and attainment/unclassifiable areas. The court found that EPA erred in implementing the PM_{2.5} NAAQS in these rules solely pursuant to the general implementation provisions of subpart 1 of part D of title I of the Clean Air Act, rather than pursuant to the additional implementation provisions specific to particulate matter

nonattainment areas in subpart 4. The Court ordered the EPA to “repromulgate these rules pursuant to Subpart 4 consistent with this opinion.” 706 F.3d at 437.

On June 2, 2014, the EPA issued a final rulemaking that begins to address the remand. *See* 79 FR 31566. Upon its effective date, the final rule classifies all existing PM_{2.5} nonattainment areas as “Moderate” nonattainment areas and sets a deadline of December 31, 2014, for states to submit any SIP submissions, including NNSR SIPs, that may be necessary to satisfy the requirements of subpart 4, part D, title I of the CAA with respect to PM_{2.5} nonattainment areas.²¹

In a separate rulemaking process which will follow the June 2014 rule, EPA is evaluating the requirements of subpart 4 as they pertain to NNSR for PM_{2.5} emissions. In particular, subpart 4 includes section 189(e) of the CAA, which requires the control of major stationary sources of PM₁₀ precursors “except where the Administrator determines that such sources do not contribute significantly to PM₁₀ levels which exceed the standard in the area.” Under the court’s decision in *NRDC*, section 189(e) of the CAA also applies to PM_{2.5}.

Kentucky’s submission of revisions to its NNSR regulations at Chapters 51:001 and 51:052 identify SO₂ as a PM_{2.5} precursor and NO_x as a presumed PM_{2.5} precursor while volatile organic compounds (VOCs) and ammonia are presumed not to be PM_{2.5} precursors for a PM_{2.5} NAA in the Commonwealth. These revisions, although consistent with the 2008 NSR PM_{2.5} Rule as developed consistent with subpart 1 of the Act, may not contain the elements necessary to satisfy the CAA requirements when evaluated under the subpart 4 statutory requirements. In

²¹ EPA a deadline of December 31, 2014, for the states to submit any additional attainment related SIP elements that may be needed to meet the applicable requirements of subpart 4 for areas currently designated nonattainment for the 1997 and/or 2006 PM_{2.5} NAAQS, and to submit SIPs addressing the NNSR requirements in subpart 4. EPA believes that this period provides a relatively brief but reasonable amount of time for states to ascertain whether and to what extent any additional submissions are needed for a particular 1997 or 2006 PM_{2.5} NAAQS nonattainment area, and to develop, adopt and submit any such SIPs.

particular, Kentucky's submission does not include the regulation of VOCs and ammonia as PM_{2.5} precursors, nor does it include a demonstration consistent with section 189(e) showing that major sources of those precursor pollutants would not contribute significantly to PM_{2.5} levels exceeding the standard in the area. For these reasons, EPA cannot conclude at this time that this part of Kentucky's NNSR submission of revisions to Chapters 51:001 and 51:052 satisfies all of the requirements of subpart 4 as they pertain to PM_{2.5} NNSR permitting.

Although the revisions to Kentucky's NNSR regulations at Chapters 51:001 and 51:052 may not contain all of the necessary elements to satisfy the CAA requirements when evaluated under the subpart 4 provisions, the revisions themselves represent a strengthening of the currently-approved Kentucky NNSR SIP which does not address PM_{2.5} at all. As a result of the June 2, 2014 final rule, Kentucky would have until December 31, 2014, to make any additional submission necessary to address the requirements of subpart 4, including addressing the PM_{2.5} precursors of VOC and ammonia for NNSR permitting purposes. EPA is approving the NNSR revisions to Kentucky's NNSR permitting program without listing the absence of either the regulation or evaluation of VOCs and ammonia as PM_{2.5} precursors as a deficiency at this time.

Finally, as subpart 4 includes requirements only pertinent to NAA, EPA does not consider the portions of the 2008 rule that address requirements for PM_{2.5} attainment and unclassifiable areas to be affected by the court's opinion in *NRDC v. EPA*. Moreover, EPA does not anticipate the need to revise any PSD requirements promulgated in the NSR PM_{2.5} Rule in order to comply with the court's decision. Accordingly, EPA's approval of Kentucky's PSD SIP and infrastructure SIP Elements (C), (D)(i)(II), or (J) with respect to the PSD requirements promulgated by the NSR PM_{2.5} Rule is not inconsistent with the court's opinion.

B. PM_{2.5} PSD Increment-SILs-SMC Rule Provisions

The Commonwealth's January 31, 2013 SIP revision adopts into the Kentucky SIP at Chapter 51 the following PSD provisions promulgated in the PM_{2.5} PSD Increment-SILs-SMC Rule: (1) PSD increments for PM_{2.5} annual and 24-hour NAAQS pursuant to section 166(a) of the CAA; (2) PM_{2.5} SILs to be used as a screening tool to evaluate the impact a proposed major source or modification may have on the NAAQS or PSD increment; and (3) PM_{2.5} SMC, also used as a screening tool, to determine the level of data gathering required of a major source in support of its PSD permit application for PM_{2.5} emissions.

Regarding the PM_{2.5} increments, the SIP revision changes include: 1) the PM_{2.5} increments as promulgated at 40 CFR 51.166(c)(1) and (p)(4) (for Class I Variances); and 2) amendments to the terms "*major source baseline date*" (at 40 CFR 51.166(b)(14)(i)(c)), "*minor source baseline date*" (including establishment of the "trigger date") (at section 51.166(b)(14)(ii)) and "*baseline area*" (as amended at 51.166(b)(15)(i)). These changes provide for the implementation of the PM_{2.5} PSD increments for the PM_{2.5} NAAQS in the state's PSD program. In today's action, EPA is proposing to approve the Commonwealth's January 31, 2013 SIP revision to address the PM_{2.5} PSD increment provisions promulgated in the PM_{2.5} PSD Increments-SILs-SMC Rule. As discussed above, EPA is not taking action to approve into the Commonwealth's SIP the PM_{2.5} SILs and SMC as established in the PM_{2.5} PSD-Increment-SILs-SMC Rule due to the D.C. Circuit's January 22, 2013 decision to vacate and remand to EPA the SILs and vacate the SMCs. *See Sierra Club v. EPA*, 705 F.3d 458.

EPA has made the preliminary determination to approve the aforementioned PSD permitting provisions promulgated in the PM_{2.5} PSD Increment-SILs-SMC Rule into the Kentucky SIP to implement the NSR program for the PM_{2.5} NAAQS.

C. Conversion of Conditional Approvals for the Commonwealth's Infrastructure SIP

As discussed above in section III, Kentucky's January 31, 2013 SIP revision also satisfies the conditions listed in EPA's previous conditional approvals for the Commonwealth's 2008 8-hour ozone, and 1997 annual and 2006 24-hour PM_{2.5} NAAQS infrastructure SIP submissions. Therefore, EPA is proposing action to convert its conditional approvals with respect to the PSD-related requirements of sections 110(a)(2)(C), 110(a)(2)(D)(i)(II) and 110(a)(2)(J) to full approvals. Given that the Commonwealth's January 31, 2013 SIP revision fulfills the conditional approval requirements for conversion to a full approval, the conditional approval language at section 52.919(a) – (c) of 40 CFR part 52, included in EPA's final conditional approvals published on October 3, 2012 (77 FR 60307), March 7, 2013 (78 FR 14681) and March 26, 2013 (78 FR 18241) are no longer necessary. Thus, EPA is also proposing to remove the conditional approval language at 40 CR 52.919, contingent upon EPA's full approval of the Commonwealth's January 31, 2013 SIP revision, to reflect that the infrastructure SIPs for the Commonwealth's 2008 8-hour ozone, and 1997 annual and 2006 24-hour PM_{2.5} NAAQS have been fully approved.

V. Proposed Action

EPA is proposing to approve portions of the Commonwealth's January 31, 2013 SIP revision adopting Federal regulations amended in the May 16, 2008 NSR PM_{2.5} Rule and the October 20, 2010 PM_{2.5} PSD Increment-SILs-SMC rule with the exception of the PM_{2.5} SILs and SMCs provisions. Final approval of the Commonwealth's January 31, 2013 SIP would also satisfy the requirements upon which EPA conditionally approved several Kentucky infrastructure

requirements related to the 1997 and 2006 PM_{2.5} and the 2008 8-hour Ozone NAAQS. As such, EPA is also proposing today, contingent upon full approval of the Commonwealth's January 31, 2013 SIP revision, to convert EPA's previous conditional approval of the Commonwealth's infrastructure requirements related to PSD requirements for the PM_{2.5} and ozone NAAQS to a full approval. EPA has made the preliminary determination that the Commonwealth's January 31, 2013 SIP revision, with regard to aforementioned proposed actions, are approvable because they are consistent with section 110 of the CAA and EPA regulations.

VI. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this proposed action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by Commonwealth law. For that reason, this proposed action:

- is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the Commonwealth, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen oxides, Particulate matter, Reporting and recordkeeping requirements.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: July 14, 2014.

Heather McTeer Toney,
Regional Administrator,
Region 4.

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